has succeeded principally on account of the order of the Board of the 7th day of December 1946 being defective.

Appeal Allowed.

FOON SEONG v. CHAN SAN CHOON (f).

[Orig. Civil Juris. (Bostock-Hill, J.) February 17, 1947]

Civil Procedure Code, Section 467 (i)—Originating Summons—Plaintiff really asking for a decision that there is a valid trust by a deceased person in his favour —Originating Summons is not the appropriate form of procedure in such a matter—Summons served on widow of deceased although Letters of Administration had not been issued to her—Originating Summons not maintainable.

The plaintiff took out an Originating Summons to obtain an order for the transfer to himself of certain Omnibus Company shares standing in the name of one Foong Onn Kwan (deceased). The plaintiff alleged that those shares were bought by him and were held in trust for him by the said Foong Onn Kwan. The Originating Summons was served on the defendant, the widow of the said Foong Onn Kwan. It appeared that the Grant of Letters of Administration of the estate of the said Foong Onn Kwan had not yet been issued to her, but she had applied for such grant. At the hearing of the Summons Counsel for the plaintiff stated that the basis of his application was the alleged trust deed referred to in the affidavits filed in support of the plaintiff's application and that plaintiff was a cestui que trust under that deed. He also asked for a postponement until the grant of Letters of Administration should actually have been issued to the defendant. Counsel for the defendant took two main objections, firstly as to the procedure by way of Originating Summons under Section 467 (i) of the Civil Procedure Code, and secondly, that serving the defendant before she had extracted Letters of Administration was wrong in law.

Held, (1) that as what the plaintiff was really asking for was a decision as to whether there was a valid trust by the deceased in his favour, the procedure by way of Originating Summons under Section 467 (i) of the Civil Procedure Code was not an appropriate form of procedure in this case; and

(2) that an Administrator cannot be sued in respect of a debt due from a deceased person, until Letters of Administration have been granted under seal, and therefore that even if the plaintiff were allowed to amend his Originating Summons by suing the defendant as administrator of the estate of Foong Onn Kwan, his Originating Summons would still not be maintainable.

Case referred to :—

(1) *Chia Teck Liang v. Tan Soo Khiang* (1936) 5 M.L.J 185.

ORIGINATING SUMMONS.

K. MacDuff for the Plaintiff.

M. S. Mahendran for the Defendant.

Bostock Hill, J. :—In this application the Plaintiff is seeking in an Originating Summons to obtain an order for the transfer to himself of certain Omnibus Company shares standing in the name of one Foong Onn Kwan (now deceased). The Plaintiff alleges that these shares were bought by him and were held in trust for him by the said Foong Onn Kwan.

The Defendant is one Chan Sau Choon (f) and, although her name appears in the Originating Summons as Defendant, no other mention of her is made in the Affidavits filed by the Plaintiff. She was, however, served, and she has filed an affidavit in reply and in that affidavit she states that she is the widow of the said Foong Onn Kwan deceased and that the Grant of Administration of the estate of the said Foong Onn Kwan has not yet been issued to her. In the course of argument by Counsel it appeared that she has applied for such grant.

The heading of the Originating Summons is as follows :—

> In the matter of certain shares in Lintang Jalong Omnibus Company Limited and in Reliance Omnibus Company Limited standing in the name of Foong Onn Kwan
>
> and
>
> In the matter of Section 467 (i) of the Civil Procedure Code.

Mr. MacDuff for the Plaintiff stated that the basis of his application was the alleged Trust Deed referred to in the affidavits filed in support of Plaintiff's application, and that Plaintiff was a *cestui que* trust under that deed. He argued that as such, he was entitled to use the procedure set out in Section 467 (i) of the Civil Procedure Code. He also stated that it would be more convenient to have the Originating Summons adjourned into Court and asked for a postponement until the Grant of Letters of Administration should actually have been issued to the Defendant.

Mr. Mahendran, for the Defendant, took 2 main objections, firstly, as to the procedure under Section 467 (i), and secondly, that serving the Defendant before she had extracted Letters of Administration was wrong in law. It is to be noted that the Defendant is named in the Originating Summons merely in her personal capacity but Mr. MacDuff had to concede in argument that he really wanted her in the Originating Summons in the capacity of legal representative of Foong Onn Kwan deceased.

Dealing first with the second objection, Mr. Mahendran cited *Chia Teck Liang v. Tan Soo Khiang*[1]. In that case it was decided that an Administrator cannot be sued in respect of a debt due to a deceased person, until Letters of Administration have been granted under seal. Hence, even if Plaintiff were allowed to amend his Originating Summons by suing the Defendant as Administrator of the Estate

of Foong Onn Kwan, his Originating Summons would still not be maintainable.

Mr. Mahendran's other objection, namely as to Procedure, also appears to be well founded. He cited *Odgers,* On Pleading (10th Edition) pages 11 and 12 but this passage apparently refers to Order 54 r. 1 of the English Rules and not Order 55 r. 3 which corresponds with our Section 467 (i).

Reference to *Daniell's,* Chancery Practice, (8th Edition) Vol. 1, page 865 and of the cases there referred to makes it clear that this Procedure by way of Originating Summons is not applicable to a case of this nature. What the Plaintiff is really asking is for a decision as to whether there was a valid trust by Foong Onn Kwan deceased in favour of the Plaintiff. Mr. MacDuff was unable to cite any authority to show that procedure by way of Originating Summons under Section 467 (i) was an appropriate form of procedure in such a matter and I am of opinion that his application is misconcieved, and that a Plaintiff cannot in an Originating Summons based on an alleged Trust ask for evidence to be heard to prove that Trust. Moreover the question at issue is a question of fact and not of law and will have to be determined in Open Court and is not suitable for determination by the procedure of an Originating Summons.

Accordingly the application is dismissed with costs but such dismissal will not operate to prevent the Plaintiff bringing some other form of proceedings to determine the points at issue.

Application Dismissed.

MUTHAN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J.) April 11, 1947]

Criminal Procedure Code (F.M.S.) Section 163 and 173—Duplicity of charges—Charge of Criminal Trespass—Penal Code, Sections 441 and 447.

The appellant in this case was convicted on the following charge. "That you on or about 4.1.47, at about 0600 hours did commit criminal trespass by unlawfully remaining in Athlone Estate cooly lines, Kapar, after having been discharged by the Assistant Manager of the said Estate with intent to commit an offence or to annoy the Assistant Manager of the said Estate and that you thereby committed an offence punishable under Section 447 (Cap. 45)." The main ground of appeal was that the charge was bad for duplicity.

Held, (1) that in this case the appellant was left in doubt at his trial as to whether the prosecution were alleging that he had unlawfully remained on the Estate with the intention of committing an offence or whether he had unlawfully remained there with the intention of annoying the Assistant Manager, and therefore the appellant must have been embarrassed at the trial.

(2) that as express provisions of the Criminal Procedure Code had been contravened and as the contravention was a matter of substance and not of form, the conviction must be quashed.

Cases referred to :—

(1) *Emperor v. Jaugi* I.L.R. 26 Allahabad 194.

(2) *Mahomed Humayoon Shah v. Regina* 21 W.R. 72.

(3) *Yap Liow Swee v. P. P.* (1937) 6 M.L.J. 225; (1937) F.M.S.L.R. 71.

MAGISTRATE'S APPEAL.

Willan, C. J. :—In this case the appellant was convicted by the Magistrate at Klang of the offence of criminal trespass punishable under section 447 of the Penal Code and sentenced to one month's rigorous imprisonment. The charge to which the appellant had to plead, and on which he was convicted, was framed in the following terms :—

> That you on or about 4.1.47 at about 0600 hours did commit criminal trespass by unlawfully remaining in Athlone Estate cooly lines, Kapar, after having been discharged by the Assistant Manager of the said Estate with intent to commit an offence or to annoy the Assistant Manager of the said Estate and that you thereby committed an offence punishable under section 447 (Cap. 45).

The appellant appealed against his conviction on several grounds, the main ground being that the charge was bad for duplicity.

Section 447 of the Penal Code punishes the offence of criminal trespass and that offence is defined in section 441 as follows :—

> Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.

In this case the latter half of the definition applies in that the appellant entered Athlone Estate lawfully, and the allegation against him was that he unlawfully remained there "with intent to commit an offence or to annoy the Assistant Manager."

It is clear from the definition of criminal trespass that the appellant could not be convicted of that offence unless he unlawfully remained on the said Estate with one or more of the intentions set out in section 441. The prosecution must prove such intention—see *Emperor v. Jaugi*[1].

Since this was a summary trial by a Magistrate reference should be made to section 173 (a) of the Criminal Procedure Code which governs summary trial by Magistrates. That section reads :—

> (a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked